91-116

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL CARROLL, DAVID CARROLL,
BEVERLY CARROLL and
JACQUELINE CARROLL,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state statutory provisions which preserve common law remedies applicable under Federal Torts Claim Act, for damages wrought of tortuous negligence are actionable in the place where the act or omission occurred in Arizona.

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PAUL CARROLL, DAVID CARROLL,
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vs.

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Paul Carroll, et al, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of appeals for the Ninth Circuit affirming an opinion of

a District Court judge, on a question on remand from the 9th Circuit Court, which was constructed of elements and legal citations other than the "law of the place where the act or omission occurred," per FTCA 28 USC 1346(b).

OPINIONS BELOW

Per SCR 14.1(k)(i) the opinion of the Court of Appeals on remand is reported as Carroll vs. United States, District Court No. 87-2043 (9th Circ. March 21, 1988), and appears in Appendix A to this petition. The opinion of the District Court for the District of Arizona appears in Appendix B to this Petition. The order of the 9th Circuit Court affirming the District Court memorandum appears in Appendix C. The denial of motion for rehearing and en banc consideration appears in Appendix D.

Such other orders, findings of fact, orders on rehearing, and other non appended materials per SCR 14.1(k)(i)(ii)(iii)(iv)(v) appear chronologically by date of entry in

sequence by number reference in the Addendum marked Lodgings per Letter from the Clerk of the Supreme Court of the United States dated July 3, 1991, and for which reference to Lodgings there is no Supreme Court Rule.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on February 6, 1991. A timely petition for Rehearing was filed on February 15, 1991. The Court of Appeals denial of the Petition for Rehearing and en banc consideration was issued May 21, 1991 and is set forth in Appendix D. This court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article VI of the United States Constitution as set forth in Appendix E
2. Federal Torts Claim Act/28 USC 1346(b)
3. 7 U.S.C. §1961. Emergency Agricultural Credit Adj. Act, 1978/P.L. 95-334 (8-9-

1978) Page 713 - Appendix F

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STATEMENT OF THE CASE

I. Remand Segment

This case arrives at the Supreme Court of the United States as the result of an order published without opinion of May 21, 1991 by the 9th Circuit Court of Appeals, Judges Chambers, Kozinski, and Noonan presiding. It affirms the opinion of Paul G. Rosenblatt, Judge of the District Court for The District of Arizona.

This opinion was in response to the question put by the 9th Circuit Court on remand of March 21, 1988, Judges Schroeder, Reinhardt, and Levy presiding. (Appendix A in its entirety.) The salient parts are reproduced in this document as being as clean an overview as one can accomplish as stated by an unimpeachable source.

There is no discussion on remand of

gratuitousness, good samaritanism or commercial application, only if a person in these circumstances could be found liable under Arizona law. The elements of those circumstances are negligence by an agent of government which economically damaged another. The remand says:

> "The district court granted the government's motion for summary judgment, finding that the Carrolls' claim was precluded by the discretionary function exception to the FTCA, 28 U.S.C. §2680(a), and by 28 U.S.C. §2680(h), which excepts claims for misrepresentation and deceit from the FTCA. We reverse.
>
> "The FTCA renders the United States liable for damages in certain situations "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b). However, several classes of tort claims are excepted from the Act's waiver of immunity.
>
> "In general, the "discretionary function exception" precludes suits based on the negligence of a government agent when that agent is exercising statutorily mandated discretion. See 28 U.S.C. §2680(a); Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987). **We have held, though, that the exception**

does not apply when a government agent acts outside his or her statutory authority BECAUSE THE AGENT IS NO LONGER EXERCISING DISCRETION, BUT IS SIMPLY DISOBEYING A STATUTORY COMMAND. See Baker, 817 F.2d at 564-66.

"It is undisputed that FmHA employees violated their own regulations in processing the Carrolls' loan applications when they: 1) failed to give specific reasons for denying a loan request, 2) failed to ensure the presence of a decision-making official at an appeal hearing, and 3) went outside the record in reviewing an appeal. Although the loan process involves much discretion, the FmHA failed to follow certain mandatory guidelines that are not discretionary. Therefore, the summary judgment must be reversed.

"The government argues that the "law of the case" doctrine precludes the Carrolls' claims against the United States to the extent that their claims are based upon alleged discriminatory treatment or procedural errors made by the FmHA. This doctrine does prevent the Carrolls from relitigating due process and equal protection issues. HOWEVER, THE HOLDINGS IN OUR EARLIER UNREPORTED DECISIONS DO NOT PRECLUDE THEM FROM PURSUING THEIR FTCA CLAIM BASED ON THE NEGLIGENCE OF THE FmHA EMPLOYEES. (Emphasis added.)

"However, the district court did not find in that case that violations of FmHA regulations did not occur. IN FACT, AS WE HAVE

NOTED, THE GOVERNMENT DOES NOT DENY THE EXISTENCE OF THOSE VIOLATIONS.

"The negligence claim was not decided in the previous litigation because it was in the administrative process required under the FTCA, and the government acknowledged at oral argument that the issue was properly withheld from the court pending the administrative decision. **THUS, NO COURT HAS EVER HELD THAT THE FmHA OFFICIALS DID NOT ACT NEGLIGENTLY IN DENYING THE CARROLLS' LOAN APPLICATIONS,** and they are not barred as the result of any failure to raise it previously.

"Our holding that the negligence claims are not barred by §2680(a) does not end the inquiry into whether the Carrolls have established a cause of action. THE CRUCIAL INQUIRY IS WHETHER, IN UNDERTAKING THE GRANTING OF LOANS, **A DUTY AROSE UNDER STATE LAW BECAUSE OF THE RELATIONSHIP THEREBY CREATED.** Whether the Carrolls have a claim against the United States depends on whether a private person under like circumstances could be found **LIABLE IN TORT UNDER ARIZONA LAW.**

"The district court made no findings with respect to this local law requirement of the FTCA, and the parties did not brief this issue on appeal. On remand, **THE DISTRICT COURT SHOULD CONSIDER WHETHER ARIZONA PROVIDES A CAUSE OF ACTION** against private parties that is analagous to the Carrolls' claim against the United States. Should Arizona law fail to provide

such a cause of action, the district judge must dismiss the case for failure to state a claim pursuant to the FTCA.

"Reversed and remanded for further proceedings **CONSISTENT WITH THIS DECISION.**"

II. District Court Segment

The sequence of events in the last three years have been a judicial roller coaster ride. Contained in the Excerpts of Records on file at the 9th Circuit are all the discourses around the proceedings at the District Court. Additionally, at the 9th Circuit Court is the accumulation of record of the treatment of this case as observed by the Petitioner through the appeals process as contained in Briefs, Writs, Motions, and Sanctions, all of record.

There seem to this Petitioner, your Pro Se servant, to be gross errors which by dent of circumstances a reasonable mind would not conjure to be casual, accidental, or incidental. That is to say that as lightning striking the same place five times in a single storm, the laws of probability

mitigate against the certain feeling of fair play or just an honest rendering of the law.

Either these errors are manifest by exceeding foolishness or they are manifest by DESIGN. For even less illuminated and more literate readers of this case come away seeing the elements easily which the justices appear to miss completely.

Notwithstanding an apparent dirth of cases which fit the Carroll fact pattern exactly, **THE LAW AS WRITTEN IS VERY EXPLICIT AND AS YET NO COURT OR THE OPPOSITION HAS SEEN FIT TO ANSWER THE ESSENTIAL REMAND QUESTION,** is there law in Arizona?

No cite by any court save that presented at oral hearing by a justice of the latest panel of the Appeals Court, 8/13/90, has dealt squarely with the issues of negligence and damages involving a governmental entity in this place, **ARIZONA.**

But no one can deny the explicitness with which the quoted elements of the Restatement of Torts 2nd redresses negligent

abuse by anyone, and especially agents of the government. And the finding of the appeals court in their memorandum (Remand) leaves absolutely nothing to the imagination that in this case government agents exceeded their authority and DISOBEYED STATUTORY COMMANDS.

There is logic to this process which current findings of the District Court and subsequently the Appeals Court simply defy without any rationale.

Petitioners have shown the true law of the state, unvarnished, as it is written which by application under Federal Tort Claims Act 28 USC §1346(b) is for all intents and purposes federal law. Thus, tort statute and the Restatement are causes of action against misdeeds which are also shown to be patently beyond exemption.

The United States District Court, District of Arizona, had jurisdiction pursuant to an Order of Remand issued by the 9th Circuit Court of Appeals, March 21, 1988. (Appendix A)

Pursuant to Local Rule 3(c), Judge William

P. Copple recused himself and the case was reassigned by lot to Judge Paul Rosenblatt on May 24, 1988.

Petitioners prepared a Statement of Position and Motion for Direction submitted June 29, 1988 which included a stipulation for clarification that this was not a fraud case but a tort case.

A status conference was held August 8, 1988 at 3:30 p.m. during which discussion the Respondent Deputy U.S. Attorney Mr. Patrick specifically stated his intention that if allowed to brief a case in Montana, Love v. U.S., No. 87-3832, Slip Op at 12685, 12696 and 12697 (9th Circ. 10/5/1990), that the issue of law would be satisfied for the District Court Judge.

The judge (Rosenblatt) claiming never to have read the case which was before him on his desk when pressed by Petitioner to move to trial, turned in a heated moment to a marked entry and stated, "But it says here," and realizing the incongruity of his

action abruptly closed the book and terminated the meeting after orally granting the permission to the Respondent Deputy to proceed with his (third) motion for summary judgment which filing took place on August 19, 1988.

The District Court Judge by his demeanor was both familiar with the case notwithstanding his protestation to the contrary and familiar with the counsel for the defense to whom he kept looking for reinforcement when confronted by commentaries of the Petitioner he could or would not address. This action was prejudged, the status meeting was a sham to sell a position. The judge did not act independently and for rationales we surmise beyond the immediate case, and **inconsistent with the decision on Remand.**

On September 14, 1988 Petitioner filed a Correction of Statement of Facts to the Defendants Motion for Summary Judgment and a Cross Motion for Summary Judgment wherein, element by element, plaintiff established the deliberate misrepresentations and

falsehoods which subsequently grounded the opinion of the District Court Judge (Rosenblatt). Also on September 14, 1988 Petitioner filed an Answer to Defense Memorandum of Law including the specific law quoted from the Restatement:

> "874A. Tort Liability for Violation of Legislative Provision.
> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, **using a suitable existing tort action** or a new cause of action **analagous to an existing tort action**."

On September 15, 1988, Judge Rosenblatt filed notice of date of oral argument for November 21, 1988 at 1:30 p.m., which was later changed to November 28, 1988.

On September 27, 1988 Respondent filed an aggressively phrased reply to Petitioner's Response to Defendant's Third Motion which

implied by the repetitious cliche of cites that Petitioner had not given any facts of law or facts of the case of consequence to be considered by the District Court Judge and thus per FRCP Rule 56 that summary judgment must be granted.

The facts which were supplied by the Petitioner **were** material to the case and **EXCERPTED THE LAW DIRECTLY** which the judge chose not to consider in his deliberation. Petitioner on November 28, 1988 filed a Statement of Oral Argument on Defense's Third Motion for Summary Judgment which enumerated the misrepresentations of defense to the court. Petitioner pressed the Court to proceed in Motion filed January 3, 1989. The court filed its memorandum on January 10, 1989. Appendix B.

III. Appellate Court Segment

Notice of Appeal was given January 19, 1989 and the case passed back to the 9th Circuit Court on appeal with a letter of appeal, with the docket statement dated

February 17, 1989, Re Lodgings #2.

The matter was administratively delayed by the untimely submission of transcripts of oral proceedings which necessitated repeated official requests to facilitate -- a period of seven months, Re Lodgings #3 (i)(ii)(iii).

Respondent moved (June 27, 1989) to further stay the briefings, Re Lodgings #4, citing the conflict of cases Love v. U.S., No. 87-3832, Slip Op at 12685, 12696 and 12697 (9th Circ. 10/5/1990), and La Plant v. U.S., #87-4046, 9th Circuit, which as you will recall, Respondent had stated to the District Court Judge would "decide" the case, **ONLY IT HADN'T BEEN AS YET ADJUDICATED AND THEN WENT THE WRONG WAY.**

Petitioner filed the opening brief having no knowledge of the Respondent Motion on June 29, 1989.

The court denied Respondents' Motion on August 7, 1989 advising Respondents to file its brief by September 6th with an optional brief September 20th, which was

later changed to September 29, 1989, and further advised Respondent of Petitioner's request to impose sanctions referring responses to a Merits panel for disposition. Re Lodgings #5.

Re hearing transcript of August 13, 1990:

"Patrick: I do have one other issue to bring up with the court; I'm not sure that the court has it before it. There is also a pending motion for sanctions that was filed by appellants, as I understand it, pursuant to the Clerk's Order or the Court's Order, it was deferred or referred to this Merits Panel for decision. I would not like that to get lost and would be happy to comment upon that if the court has any questions.
Kozinski: Appellants against the United States?
Patrick: Against me personally.
Kozinski: Do you want to speak to it?
Patrick: I think I have adequately commented in my response in pleading. I did want to note that it was still pending, apparently before this panel, and I have a personal vested interest in the disposition of that motion.
Kozinski: We'll dig it up."

NOTE: Petitioner has yet to hear a follow-up inquiry from the Merits Panel or the three Judges Chambers, Kozinski, and

Noonan of the 9th Circuit Court, and we don't even know the procedure.

Respondent timely filed a brief September 6, 1989. Petitioner filed a Reply on September 29, 1989 correcting the erroneous references of Respondent and attempting to refocus the discussion on the point of the Remand, i.e., **DUTY, STATUTORY COMMAND AND EXISTENCE OF A CAUSE OF ACTION.**

The San Francisco earthquake occurred in October, 1989, and the court took some weeks to reestablish itself. Upon reference in the news media on April 15, 1990 and May 16, 1990, of two cases later in the filing, of shorter duration which had been adjudicated by the Ciruit Court as Petitioners awaited word of the progress of the repair of the Court, Petitioners moved to expedite oral argument May 25, 1990.

The Court responded with an order to expedite lodged June 7, 1990 to be calendered in the month of August.

Oral hearing took place on August 13,

1990. Discussion of this incident is contained in "Reasons for Approving Writ". An order therefrom was issued requiring a brief of not more than five pages by Defense within 10 days discussing McCutchen v. Hill, #710-P2d, 1056 [Az. 1985] on 1048 (Re Lodgings #6), to which Petitioners reply was instructed not to exceed five pages also. Re Lodgings #7(i).

Respondents' brief (Re Lodgings #7(ii)), on order, was filed August 17, 1990 in which defense (page 5) contended that,

> "**THIS COURT** has previously held that Plaintiffs were not deprived of any protected property interest by FmHA errors" . . . that . . . "McCutchen v. Hill cannot be used to justify recovery against the U.S. for economic loss",

with the Respondent's intent of mixing remarks out of context from the "law of the case" argument from a previous Carroll case debunked by the Remand Order. Appendix #A.

The essence defense wanted to convey by that quote was that the courts had, it is alleged, stated a position that no property

interest was lost. However, there is no question that equity was lost. The true essence of the quote is that losses were alleged NOT TO BE THE RESULT OF FmHA ERROR. Yet in the instant case Carroll vs. United States, 89-15178 9th Circuit Court, the government concedes the errors which constitute the negligence, an issue they did not wish to concede in Carroll v. Cluck #83-2005 (9th Circuit 2/21/84).

The negligence is manifest, the detrimental reliance is a matter of record and the effect of these causes is at this point uncontrovertible fact of **THIS** case.

Except that "this court", the 9th Circuit on Remand never made such a ruling in this case. There are only a memorandum of March 21, 1988 from the 9th Circuit (Remand), a memorandum of the District Court, January 10, 1989, neither of which references a previous finding of protected property interest. **THE PASSAGE DOESN'T EXIST IN THIS CASE.** This court never made such a finding

and the attorney for the defense misrepresented the facts in implying they did.

A finding on a separate issue to a previous case, Carroll v. Cluck #83-2005 (9th Circuit 2/21/84) is taken out of context to the point of argument of this case; arguing loan limits under an ex post facto application of a loan cap legislated AFTER the incident and after the Public Law 95-334 was enacted to give relief from the disaster, a finding directly thwarted by the remand which says,

> "However, the holdings in our earlier unreported decision **DO NOT PRECLUDE THEM FROM PURSUING THEIR F.T.C.A. CLAIM BASED ON THE NEGLIGENCE** of the FmHA employees." Referencing Carroll v. Cluck (footnote 3 bottom of page 5 of the Remand).

This remark in the remand addresses the "law of the case" doctrine by which defense counsel wished to press in the District Court under **FRCP Rule 56** for summary judgment based on all the contentions of previous incarnations of the Carrolls' legal experience, while extrapolating an "opinion" relating to a **MERE EXPECTATION** of a loan which was **language**

taken directly from defense's own briefs in Carroll v. Cluck. The points of discussion in that case never dealt with any duty under PL 95-334 and do not apply to the discussion of this case at bar.

Likewise the quote referencing "protected property interests" is also extrapolated out of context from Carroll v. Cluck as taken directly from defense briefs in that case.

Both contentions belong to the body of "Law of the Case", doctrine which was found wanting in the remand. See page 4 of the Remand at #2 - Appendix A.

Error is manifest in this area because of the duty of care, fiduciary responsibility, detrimental reliance on the agents commissioned to execute the Public Law (95-334) and a demonstrable loss of equity, an element of tort.

The Carroll v. Cluck findings for purposes of the instant case are factually unfounded and in fact controverted by more recent evidences on record in this case.

On Page 4 of that document, Re Lodgings #7(ii), defense Respondent stated that the Arizona Supreme Court evidences no clear pronouncement of a change in Arizona law via McCutchen v. Hill. The case exists; it takes a position. How can defense Respondent require the court to accept carte blanche his presentations of case law and the favorable positions they may imply to the government's position and ignore as **clear a pronouncement of a definition of law** of a critical case which doesn't agree? This is ludicrous.

Petitioners filed an Answer to Respondent's supplemental brief on August 28, 1990 comparing directly McCutchen to Carroll. Re Lodgings #8.

The case languished for three and one-half months until the court unilaterally issued a non-published certification order to the Arizona State Supreme Court (Re Lodgings #9(i)) with a dissent on December 17, 1990. Re Lodgings #9(ii).

On December 27, 1990, Petitioners filed

a Writ of Mandamus to both the 9th Circuit Court (Re Lodgings #10(i)) and companion writ to the Arizona Supreme Court. The State Supreme Court Writ was sent to the Circuit Court to be forwarded with all other necessary documentation to the State's court. Re Lodgings #10(ii).

On January 18, 1991, the Circuit Court reissued the Certification Order for publication. Re Lodgings #11.

On January 29, 1991, Petitioner sent directly to the State's Supreme Court an addendum to the Writ of Mandamus which had previously been sent to the Circuit Court for forwarding to the State's Court. Re Lodgings #12(i).

On January 30, 1991, the Clerk of the State Supreme Court returned all documents stating in a separate letter that the Court received the Certification Order on January 23, 1991 and returned it to the Circuit Court the following day, refusing to accept the question as being too hypothetical (Re Lodgings

#12(ii)) about which Petitioner had contended all along that it was a **WRONGLY CONSTRUCTED QUESTION ANYWAY.**

An Order issued from the Circuit Court on February 6, 1991, affirming the District Court Order of January 10, 1989 on the basis of its memorandum. Appendix #C.

NOTE: No reasons were given or explanations of what elements of the memorandum were considered to be the deciding issues. Also, de facto, the order addresses affirmation on the basis of the memorandum only, **excluding references made by government's counsel in brief about issues they wished to dredge up from their by-now debunked law of the case doctrine in Carroll vs. Cluck.**

POSTSCRIPT: On February 14, 1991, eight days after the order affirming the District Court memorandum, just to clean up a little bookkeeping, the court filed an order denying the Emergency Motions and Writs composed during the penancy of the State Supreme Court Certification Order

charade. Re Lodgings #13.

IV. Rehearing Segment

Petition for Rehearing per FRAP Rule 40 with suggestion for hearing en banc, FRAP Rule 35, Circuit Rule 35, was filed timely February 15, 1991, which contains purposes and counsel's (Pro Se) Statement of Cause. Re Lodgings #14(i).

Petitioner filed an emergency motion under Circuit Rule 27-3 for the edification of the whole court citing the 21-day rule. Under cover of the Emergency Motion was a Supplemental Brief to the petition for rehearing, Motion for Sanctions against a Federal Judge and Motion to Compel by Writ of Mandamus per Rule 21 on March 15, 1991. Re Lodgings #14(ii).

The court denied that emergency motion under Circuit Rule 27-3 on order of April 2, 1991. Re Lodgings #14(iii).

On April 19, 1991, Petitioner filed with the Court a motion to proceed in Writ of Mandamus per Rule 21 to the whole court

per Rule 35. This Motion and Writ contains an overview of the case and a newly media published story (of April 7th, 1991) concerning the fraudulent use to WHICH THE PROPERTY DESCRIBED IN THE NEGLIGENCE IN THIS VERY CASE had been put which contained illuminating references by government agencies about the laxity with which other agencies and the Justice Department pursue such abuses and negligences in the State of Arizona. Re Lodgings #15.

The Court responded May 21, 1991 by denying the Petition for Rehearing and rejecting En Banc consideration. Appendix #D.

Petitioner, having waited the customary thirty days, on May 22, 1991 sent a motion to show cause which they had developed under FRAP Rule 21, having not received the order of denial posted only a day previous. Re Lodgings #16. Petitioner only the other day (June 20, 1991) received in the mail a denial to this motion to show cause. **Doesn't anybody want us to know why?**

Petitioners have contended that the structure and appearance of the case has not changed appreciably from the fact pattern as the Remanding Court received it with the exception that the discussions have been somewhat expanded with a new case brought to the record by the court, McCutchen. The Love and La Plant cases have advanced as noted in motion for rehearing, and an addition of recent history on the fraud aspect of the same property in contention described in the negligence was brought to the record during the rehearing segment.

REASONS FOR GRANTING THE WRIT

Issue 1. Notwithstanding that statutory provisions preserve the common law remedy for damage in tort, respective of the literal reading of the Federal Torts Claim Act which requires adjudication of all claims for damages in tort in a Federal context shall be under color of, "law of the place where the act or omission occurred," 28 U.S.C. §1346(b).

The finding of a previous dais of the 9th Circuit on Remand March 21, 1988 asserted that only one question of the law remained to be answered, that being in short, is there a cause of action in the place where the act or omission occurred (Arizona). The court further noted that should no cause of action be found in the place, that the case must be dismissed for lack thereof. That law, both common AND statutory, is comprehensive, abundant, readily identifiable and routinely utilized with great frequency to adjust various damages of claimants in many contexts in the State of Arizona, under ARS Title 12 and The Restatement of Torts 2nd.

On remand, the District Court Judge constructed A FALACIOUS RENDERING OF LAW COMPOSED OF LAW FROM PLACES OTHER THAN THE PLACE WHERE THE ACT OR OMISSION OCCURRED AND EXCLUSIVE OF THE ACTUAL PUBLISHED LAW; from which the last dais of the Circuit Court affirmed that finding of no cause of action, read no applicable law in the place where

the act of omission occurred. Additionally, the Motion for Summary Judgment was granted in no small measure due to a FRCP Rule 56 argument by Respondent that characterized all of the Petitioner's responses -factual and documented as they were -- as being "hearsay" and inadmissible to consideration by Judge Rosenblatt on balance of evidence to grant the motion or not and founded in great part on assertions of moot case law previous to the remand and allegations of other case cites which had yet to be adjudicated. Respondent counsel set out to disenfranchise the truth of the present by pressing that which did not exist from both the past and the future. Responding later, counsel for the government in Brief to 9th Circuit Court on Appeal, September 6, 1989, in citing Tuepker v. Farmers Home Administration 708 F.2d 1329, 1333 (8th Circ. 1983) alleges that rights and protections afforded by this law are guaranteed under federal NOT LOCAL LAW when the instructions

on Remand were specifically to examine the local law aspect of F.T.C.A.

The actual reading on Tuepker contained in Notes of Decisions Relating to Public Law 95-334 re: 7 Prec. 1961 Subchapter III - EMERGENCY LOANS/HISTORICAL & STATUTORY NOTES -- P-410-411, states:

> "No cause of action lay under Federal Tort Claims Act, sections 1346(b) and 2671 et seq. of Title 28, for allegedly negligently processed application for loan under Emergency Agricultural Credit Adjustment Act, **ABSENT SHOWING OF VIOLATION OF ANY MANDATORY, STATUTORY OR REGULATORY PROVISION OR, assuming that agency actions did not fall within exception for discretionary actions under section 2680 of Title 28, ALLEGATION OF ANY FACTS THAT UNDER SIMILAR CIRCUMSTANCES A STATE COMMON-LAW TORT ACTION WOULD CREATE A CAUSE OF ACTION AGAINST A PRIVATE INDIVIDUAL."** Tuepker v. Farmers Home Admin., C.A.Mo. 1983, 708 F.2d 1329.

Tuepker

(1) Did not make a showing of agents of government acting outside mandatory, statutory or regulatory authority.

(2) But the court did recognize the necessary element of **state law to perfer**

a cause of action under F.T.C.A.

The only deciding question in Tuepker was the question of DISCRETION which Carroll et. al. have already surpassed Per Remand of March 21, 1988 where the court states ..."**it is undisputed that FmHA employees violated their own regulations in processing Carroll's loan applications...**" NOT as Respondent would **imply a separation of Federal law from State law.** This is a misrepresentation of the law from the very cite counsel wished to press his argument in brief to the Appeals Court. **This is a lie.**

None of these elements were remarked upon in the District Court memorandum which was later affirmed by the Circuit Court also with no evidence of recognition.

The application of a state law under F.T.C.A. (Re: Tuepker) makes the decision a point of Federal law. Per Supreme Court Rule 10.1(b), the affirmation of the District Court memorandum by the Circuit Court is

in conflict with the principle of law upheld by the Arizona State Supreme Court in McCutchen v. Hill brought to the record in the 9th Circuit Court by an honorable justice (Noonan) of that dais as **"fitting to a T"**. The quote of Law which the Arizona Supreme Court brought to the record is: Re McCutchen v. Hill, 710 P2d, 1056 (Ariz 1985) on 1058. Citing from the Restatement of Torts 2nd, 323 ...

> "One who undertakes gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other person or things, is subject to liability for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if ... (b) the harm is suffered because of the other's reliance upon the undertaking."

Note that liability applies to "physical harm" either to person, assumably bodily injury, OR things as physical damage to property or the deprivation of possessions or cash flow or business, etc. The law does not say ONLY liability for physical harm to the body of the person. Even Respondent had to include "land or chattels" (Re Lodgings

#7(ii)) but went on to plead that the law only applies to bodily injury, though he knew what the law meant. But the Arizona Supreme Court in McCutchen on this very argument, three whole years before the Rosenblatt opinion, awarded economic damages to repair the loss of a "thing" -- not a bodily injury -- on this very same quote of law in the place where the act or omission occurred per F.T.C.A. 28 USC §1346(b), per Judge Noonan's remark.

The law exists. Therefore the cause of action exists contrary to the position of the District Court memorandum.

Issue 2. The Judicial proceeding has been hampered by the Circuit Court in two ways:

A. That the structure, tone and function of the Certification Order to the State Supreme Court, 12/17/90 and 1/13/91, had the opposite of its intended effect. For had the State Supreme Court answered assertively the status of the law in the place where the act or omission occurred, the Circuit Court could

not reasonably have affirmed the District Court memorandum, since the previous finding of the State Supreme Court affirms issues in a case [McCutchen v. Hill] (a) that tort law is a cause of action in the State of Arizona; (b) for negligence; (c) against employees, agencies of government; (d) for money damages; and (e) (implied) with no physical injury requirement. Therefore, the Circuit Court has sanctioned a departure by the lower court by asking it not to answer definitively the question in certiorari as to call for an exercise of this Court's powers of supervision. Supreme Court Rule 10.1(a).

B. The procedure for consideration en banc may be proven circumstantially to have been abridged, terminated; procedural error which mitigates for reconsideration by the courts and/or call for an exercise of this (Supreme Court's) powers of supervision. Supreme Court Rule 10.1(a).

For these reasons, one structural, one procedural, this constructionist court ought

find no fault in reiterating the intent of Congress to address matters stemming from a law it has fashioned not found to be unconstitutional, and the constitutional principle of common law that for every injury there is a remedy and additionally reproach the lower courts for the danger of judicial expansionism which creates law which was not legislatively tested and abridges laws which are established legal writ against Article VI of the U. S. Constitution. Appendix #E.

There is no intimation that the granting of damages for the negligence of this government agency in **disobeying a statutory command** in any way inhibits the authority or changes the status of regulation of FmHA or the rules of its conduct. On the contrary, as stated by the previous 9th Circuit Court on Order of Remand under the guilding language of the Supreme Court in certiorari:

> "We have held though that the exception does not apply when a government agent acts outside his or her statutory authority because

> the agent is no longer exercising discretion but is simply DISOBEYING A STATUTORY COMMAND." Page 3 Remand Order of 9th Circuit Court, March 21, 1988.

In ruling for the petitioner, the Court reasserts the principle that agencies are prohibited from unauthorized behavior beyond the pale of its rules and ought to be accountable in oversight for its misdoing in order to insure its security and integrity to the citizenry that government should by example act in a responsible manner which is beyond reproach.

To do otherwise is to send a message that government agencies are subject to corruption and legitimated protectionism of their domain by passive acquiescence of the courts. **IT IS THE WRONG MESSAGE.**

The desire of these Pro Se citizens is not to be inconsistent with the will of Congress or the Constitution, but to take a position which upholds these principles.

This court surely cannot take a position opposite the best intentions of Congress

or of the Constitution to strengthen the hand of human frailty to misuse the authority vested by the government at the expense of injury to life quality and equity of any citizen which to date has been the history of this case.

There are to be sure separate "special and important" facts which need to be considered.

As stated repeatedly, the petitioners, your pro se servants, are farmers, not lawyers, but more importantly they are family farmers who represent a MINORITY interest in society. While not a legal minority as that legislatively established by race, gender, or religious affiliation, FAMILY FARMERS constitute only 3% of the population base, yet produce many times their proportionate weight in goods and services compared to other segments of the producing economy and what they produce is the foundation upon which all other production rests. Remove food and fibre from the society and it will

crumble in a week.

Massive lobbies represent the interests of the middleman; packers, processors, stock merchants, futures buyers, brokers, and banks, all of whom in some way distribute the produce. Other lobbies represent manufacturing, tractors, trucks, farm machinery and chemical corporations for pesticides and herbicides. All want to have an impact on the legislated policies which guarantee them a price to insure stability of their economic environment.

But who ACTUALLY represents the interests of the people who produce the foundation of that bounty? You can't name one because there isn't one and there hasn't been since the national granges were broken with the advent of the Depression. Farm state elected officials ostensibly speak to the needs of the family farm but their advice comes from the lobbies of the contributors, the middle man corporations and banks.

The Executive Branch of government has historically sided with corporations and

what considerations are made for farmers are usually necessary concessions just to keep them from going under completely because no one can replace them.

While an individual's farm is as capital intensive as it is labor intensive, farmers get the rap of being wealthy but their mean incomes are below the median for the rest of the economy and ironically many are on welfare -- food stamps to buy food for the family when it is their job to provide food and fibre for all the rest of the society without which, as we have said, there would be none.

Agricultural policies have evolved which cast family farmers into virtual indentured servitude and that indenture has in great part eaten up the equity base which the family farmer as a producing business requires for economic stability, no less so than McDonnell Douglas to build attack helicopters, General Dynamics to build submarines, or Ford Motor Company to build tractors, trucks and

automobiles.

Without that equity base, there would be no such industries. Yet no one intimates that there is corruption in these industries even in the face of evidence of blatant cost overruns, cost plus schemes and hemorrhages of economic reserves in the trillions of dollars over decades; for six hundred dollar toilet seats and hundred dollar hammers.

Who protects the farmer? Who guarantees that his voice will be heard, that his rights will be maintained, that his protection against infringement will be guaranteed?

THIS COURT IN THIS CASE. THAT'S WHO.

And after this, perhaps there will be others, simple people who will find their voice and stand up for themselves as no one else has.

The Constitution is of the people, by the people and for the people. This court is of the Constitution, by the Constitution, and for the Constitution under Articles of law. That makes this Court for the people

as a matter of law; that is the supreme law of the land. Do you need a better reason?

The common law axiom is that for every injury there is a remedy. Remedies for agriculture are few and disproportional to the crisis, like a teacup to bail out the Titanic.

But addressing negligence, whether deliberate or indeliberate, which perverts the best intentions of the legislative has to begin somewhere. Let it begin here. Put meaning behind that intent. Let it begin here. Stand up for the construction of the correct law. Let it begin here.

Is the function of the law to reflect the highest standards of the ideals to which a culture ascribes or a feudal tool of suppression?

The living Constitution is an experiment from its inception, according to the men who drafted it, to invert a then feudal tradition of state supremacy and state domination which placed all rights with the

state, all protections to the state while invoking under the force of law a duty of its subjects with no protections, no voice and no recourse -- except revolution which was the ultimate outcome. The King's man was meant to be feared.

Constitutional "revolutions" are meant to be bloodless refinements of the foundation doctrine that government be RESTRAINED from capricious harm to the citizenry whom the rule of law is meant to protect. The government constitutionally is not greater -- nor less -- than the status of the citizenry. It is an EQUAL partner in principal. It must be so in order for the Constitution to work for it only works on a basis of equal respect.

Cerfs do not bow to the monarch out of unrequited affection; nor does any disaffected citizen of any repressive government in the world to which we are today witness in an era of revolution, against police state tyranny.

In a day when the rest of the world concedes to the American Constitutional doctrine, the seat of that hope erodes to a feudal polyarchy commanded by many Ceasars and lower minions who indirectly collect their benefit from acquiescence to the mean of the structure of government as a repressive tool of bureaucracies to which it has evolved -- of which corruption may be said to be a hallmark and an important key to gaining and maintaining power.

Rule 10.1 of the Supreme Court Rules says there must be compelling cause for the U.S. Supreme Court to review an issue. That "a Petition for a Writ of Certiorari will be granted only when there are special and important reasons . . ."

> "Rule 10.1(a). When a United States court of appeals has rendered a decision which has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

> "(b). When a state court of last resort has decided a federal question in a way that conflicts with the decision of a United States court of appeals.
>
> "(c). When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

How more blatant an example than the ignoring of a **STATUTORY command**, or in the case of the lower courts, their own rules (the parameters of which are much discussed in the text of this case). See Lodgings attached.

How can a court dispense justice from the actual published law which it won't even acknowledge? Mere citations of excerpts of cases are not the law. And so let it begin here. If there is to be a voice for Constitutional principle, let it begin here, as it applies to a very injured segment of this culture.

The function of federal agencies is to regulate in the public interest while the courts are challenged to protect the rights of the individual, theoretically both committed to the well-being of the citizenry.

Abuse of statutory commands, negligent behavior exceeding the rules and the mere possibility of underlying corruption serve neither the public interest or the rights of the individual and it remains for the courts to distinguish between what is public interest as against what is individual protection.

However circumstantially we have here an incident where the negligent acts or omissions on the part of a governmental entity serve neither the public interest or the individual protection thus in tort as a remedy the court is directly proactive to one and indirectly responsive to the other.

As the agency served neither, this court can serve both.

The memorandum of the District Court

which the Circuit Court has upheld (with no reason) serves only to reinforce abuse of both the public interest and the protections of an individual.

It is inconceivable that the high court could countenance such abuse of an area which is within its purview to examine and in which such examination holds harmless the court from "policy making" to which it might otherwise be sensitive.

For it is not the desire of this Petitioner to inveigle this court into making new law contrary to that which is statutory, but rather admonish the courts to exercise their respective powers of supervision to do what was asked of the lower courts repeatedly -- **TO OBEY THE LAW.**

- SUMMARY

1. The Circuit Court on Remand, March 21, 1988, asked a simple question guilded by the tangents of logic presented to it by the high court in Certiorari, January

13, 1988, that question being, is there a cause of action in tort in the place where the act or omission occurred, in Arizona?

2. The District Court misrepresented the status of the law per F.T.C.A. 28 U.S.C. §1346(b) by excluding reference to the "law of the place where the act or omission occurred", which is clearly established statutorily to preserve the common law remedy for damages in tort under provisions of Arizona Revised Statute Title Twelve which uses the Restatement of Torts 2nd as its relevant guide.

3. This Circuit Court was even cognizant of a noted case (McCutchen v. Hill) affirmed by the Arizona State Supreme Court the elements of which include: (a) that tort law is a cause of action in the State of Arizona; (b) for negligence; (c) against employees, agencies of government; (d) for money damages; and (e) (implied) with no physical injury requirement.

(i) Wrote a Certification Order to the State Supreme Court to clarify the status of the law and then asked it to do nothing.

(ii) Affirmed the finding of the District Court that there is no cause of action in Arizona without reasons.

4. The Circuit Court erred grievously in:

(a) the departure from accepted and usual course of judicial proceedings on Rehearing and En Banc suggestion AND sanctioned such departure by a lower court not to respond to the certification;

(b) decided a Federal question in conflict with its application by lower court and the spirit of the previous remand of the same court of Appeals; and

(c) decided an important question -- with impact far beyond the immediate case which should be decided by this high court and which is in conflict with the intent and spirit of the law as it is written and constitutional and legislative intent which this court swears itself to defend under

Article VI of the United States Constitution. Appendix #E.

The order of the 9th Circuit Court of May 21, 1991, Judges Chambers, Kozinski, and Noonan presiding, states several issues which must be considered separately in order to interpret their significance in concert.

1. "The majority of the panel . . . voted to deny the petition for rehearing."

This majority of two are Judges Chambers and Kozinski since the order states that the remaining Judge Noonan would grant a rehearing.

2. "Judges Kozinski and Noonan HAVE **VOTED** TO REJECT THE SUGGESTION FOR REHEARING EN BANC and Judge Chambers so recommends."

The F.R.A.P. Rule 35 is very clear about the sequence of events in En Banc consideration; these are as follows:

1. Receipt by the court of Motion for Rehearing/En Banc recommendation;

2. Notification to the Clerk of Court by the presiding dais of intention either (a) to rehear or (b) not rehear the case. Should the dais choose to rehear the case,

en banc consideration ends and the dais assumes its role in rehearing.

3. However, should the dais choose (b) NOT TO REHEAR, the Clerk will notify the court (Chief Justice) from which time any one justice making memorandum of interest in En Banc consideration automatically begins a toll of 21 days in which the whole court -- all judges may vote for en banc consideration by a panel chosen by lot by the Chief Judge, a panel of ten.

What may we deduce from this construction of this order?

The order also states that, "no Judge of the (whole) court has requested a vote on suggestion for rehearing En Banc."

Yet from the sequence of events, according to the Rules of the Court, Judges Kozinski and Noonan COULD NOT HAVE VOTED TO REJECT THE EN BANC CONSIDERATION if no judge in the whole court requested a vote.

The statement (Record of Brief, Motion to Proceed of April 19, 1991) references the notification by the Court Clerk in

a telephone conversation of March 13, 1991 on inquiry by Paul Carroll that the voting had begun. Re Lodgings #15.

Yet subsequently, as noted, on April 9, 1991, the court clerk said that the memorandum HAD NOT been sent and voting had not begun.

The only way Judges Kozinski and Noonan could have VOTED on the En Banc issue was if some judge, only one, voiced an opinion in favor of this consideration.

This is an ERROR of the court, a departure from the process, an error of rules which begs the question for accountability of accepted and usual course of judicial proceedings as to call for an exercise of this Supreme Court's powers of supervision per Rule 10.1(a).

Since the order affirms that the dais initially denied Rehearing, Error is manifest in one of only two possible ways:

A. A vote was commenced at a time between February 15th and March 15th, 1991,

without receipt of the memorandum by a judge of the whole court attesting concern for En Banc consideration. This is highly unlikely since the clerk, a subordinate of the Chief Justice would not reasonably have jeopardized a career standing with so grievous an error to summarily execute a function of the court without authority -- assuming exquisite comprehension of the rules by the clerk for which cause this post is entrusted to that person.

B. **That in fact a vote was initiated with proper authority but summarily terminated by the interaction of person or persons unknown.**

These two facts, contained in this order, are mutually exclusive and cannot, by the rules, coexist in the same document.

Petitioner Paul Carroll, et al, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming an opinion of

a District Court judge, on a question on remand from the 9th Circuit Court, which was constructed of elements and legal citations other than the "law of the place where the act or omission occurred," per FTCA 28 USC 1346(b).

Respectfully submitted this 17th day of July, 1991.

Paul Carroll
Paul Carroll

David Carroll
David Carroll

Jacqueline Carroll
Jacqueline Carroll

Beverly Carroll
Beverly Carroll

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Mar 21 1988

PAUL CARROLL, DAVID CARROLL, BEVERLY CARROLL and JACQUELINE CARROLL,	)	No. 87-2043
Plaintiffs-Appellants,	)	D.C. No. CV-85-135-P-WPC
v.	)	MEMORANDUM *
UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Arizona

William P. Copple, District Judge, Presiding
Argued and Submitted February 12, 1988
San Francisco, California

Before: SCHROEDER, REINHARDT and LEAVY,
Circuit Judges

The Carrolls brought suit under the Federal Tort Claims Act (FTCA) alleging that Farmer's Home Administration (FmHA) officials negligently failed to grant their loan applications, and that FmHA officials were guilty

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

APPENDIX A

of fraud and misrepresentation in handling their loan application. The district court granted the government's motion for summary judgment, finding that the Carrolls' claim was precluded by the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a), and by 28 U.S.C. § 2680(h), which excepts claim for misrepresentation and deceit from the FTCA. We reverse.

1. Discretionary Function Exception.

The FTCA renders the United States liable for damages in certain situations "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). However, several classes of tort claims are excepted from the Act's waiver of immunity. In general, the "discretionary function exception" precludes suits based on the negligence of a government agent when that agent is exercising statutorily mandated discretion. See 28 U.S.C. § 2680(a); Baker v. United

States, 817 F.2d 560, 562 (9th Cir. 1987).[1/] We have held, though, that the exception does not apply when a government agent is no longer exercising discretion, but is simply disobeying a statutory command. See Baker, 817 F.2d at 564-66 (discretionary function exception not a bar to claim against the United States where Health, Education, and Welfare employees failed to follow a specific mandatory regulation); Collins v. United States, 783 F.2d 1225, 1230-31 (5th Cir. 1986).

It is undisputed that FmHA employees violated their own regulations in processing the Carrolls' loan applications when they: 1) failed to give specific reasons for denying a loan request, 2) failed to ensure the presence of a decision-making official at an appeal hearing, and 3) went outside the record in reviewing an appeal. Although the loan process involves much discretion,

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1/ Petition for certiorari filed with U.S. Supreme Court on January 13, 1988.

the FmHA failed to follow certain mandatory guidelines that are not discretionary. Therefore, the summary judgment must be reversed.[2/]

2. "Law of the case" doctrine

The government argues that the "law of the case" doctrine precludes the Carrolls' claims against the United States to the extent that their claims are based upon alleged discriminatory treatment or procedural errors made by the FmHA. See Planned Parenthood of Central and Northern Arizona v. Arizona, 718 F.2d 938, 949 (9th Cir. 1983). Because of previous litigation, this doctrine does prevent the Carrolls from relitigating due process and equal protection issues. However,

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2/ In addition to the discretionary function exception, the district court ordered summary judgment based on the "misrepresentation and fraud" exception to the FTCA. 28 U.S.C. § 2680(h). It undoubtedly did so because of language in the Carrolls' complaint alleging misrepresentation and fraud on the part of the FmHA. However, the Carrolls disavow any intention to pursue their allegations of fraud and misrepresentation. Accordingly, on remand the district court should construe the Carrolls' complaint as setting forth a cause of action for negligence only. Appropriate amendments to the complaint may of course be ordered.

the holdings, in our earlier unreported decisions[3/] do not preclude them from pursuing their FTCA claim based on the negligence of the FmHA employees.

In the previous litigation, the Carrolls were unsuccessful on due process and equal protection claims involving essentially the same facts as here. The earlier district court decision which we affirmed was based on the finding that any procedural errors committed by the FmHA were not of a constitutional order and therefore did not result in a due process or equal protection violation. However, the district court did not find in that case that violations of FmHA regulations did not occur. In fact, as we have noted, the government does not deny the existence of those violations.

The negligence claim was not decided in the previous litigation because it was in the administrative process required under

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3/ Carroll v. Cluck, No. 83-2005 (Feb. 21, 1984); No. 84-2064 (Feb. 25, 1986).

the FTCA, and the government acknowledged at oral argument that the issue was properly withheld from the court pending the administrative decision. Thus, no court has ever held that the FmHA officials did not act negligently in denying the Carrolls' loan applications, and they are not barred as the result of any failure to raise it previously.

3. Conclusion

Our holding that the negligence claims are not barred by § 2680(a) does not end the inquiry into whether the Carrolls have established a cause of action. The crucial inquiry is whether, in undertaking the granting of loans, a duty arose under state law because of the relationship thereby created. See United Scottish Ins. Co. v. United States, 614 F.2d 188, 194 (9th Cir. 1979), aff'd after remand 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds, 467 U.S. 797 (1984). Whether the Carrolls have a claim against the United States depends on whether a private person under like circumstances could be

found liable in tort under Arizona law.

The district court made no findings with respect to this local law requirement of the FTCA, and the parties did not brief this issue on appeal. On remand, the district court should consider whether Arizona provides a cause of action against private parties that is analogous to the Carroll's claim against the United States. See Baker, 817 F.2d at 566; Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151, 1156-59 (D.C. Cir. 1985); Tuepker v. Farmers Home Admin., 708 F.2d 1329, 133 (8th Cir. 1983). Should Arizona law fail to provide such a cause of action, "the district judge must dismiss the case

for failure to state a claim pursuant to the FTCA." Id.[4/]

Reversed and remanded for further proceedings consistent with this decision.

4/ We indicate no view on this difficult question. There are no circuit court opinions of which we are aware that consider whether under state law a tort claim would arise under the circumstances present here. However, at least one district court has concluded that no analogous state cause of action exists. Nichols v. Block, 656 F. Supp. 1436, 144-46 (D. Mont. 1987); Love v. United States Dept. of Agriculture, 647 F. Supp. 141, 144-47 (D. Mont. 1986). We neither endorse nor reject the Montana decisions and prefer to allow the Arizona district court the first opportunity to consider the present matter without offering premature advice.

UNITED STATE DISTRICT COURT

DISTRICT OF ARIZONA

PAUL CARROLL and JACQUELINE CARROLL, husband and wife; DAVID CARROLL and BEVERLY CARROLL, husband and wife;	)	CASE NUMBER CIV 85-135-PHX-PGR
Plaintiffs,	)	JUDGMENT IN A CIVIL CASE
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court has granted Defendant's third Motion for Summary Judgment and denied Plaintiffs' Cross-motion for Summary Judgment; therefore, Plaintiffs take nothing and the action is hereby dismissed.

Dated: January 10, 1989

RICHARD H. WEARE, CLERK

By: /s/ Shirley Dorfman
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PAUL CARROLL and JACQUELINE CARROLL, husband and wife; DAVID CARROLL and BEVERLY CARROLL, husband and wife, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	FILED Jan 10 1989 NO. CIV-85-135 PHX PGR MEMORANDUM AND ORDER

This action, brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. Sec. 1346(b) and 28 U.S.C. Sec. 2671 et seq., was filed January 18, 1985. Plaintiffs, Paul and Jacqueline Carroll and David and Beverly Carroll, alleged in their complaint that Farmer's Home Administration (FmHA) officials negligently failed to grant their emergency loan applications and that these officials were guilty of fraud and misrepresentation in handling the loan applications. The district court granted the government's motion for summary judgment. On appeal, the Ninth Circuit reversed and remanded the case for

consideration of the issue "whether Arizona provides a cause of action against private parties that is analogous to the Carrolls' claim against the United States."

Although all the Plaintiffs filed emergency loan applications with the FmHA, the focus of this action is the application filed by David Carroll. The facts in this case are extremely involved and were set forth in Defendant's October 31, 1986 statement of facts, accompanying its second motion for summary judgment. Following is a summary of those facts.

Mr. Carroll's farming operation in Yuma suffered several natural disasters in 1976 and 1977. In June, 1978, Yuma County was designated a disaster area by the Secretary of Agriculture. That same month, Mr. Carroll filed his first emergency loan application under the Emergency Agricultural Credit Adjustment Act of 1978. These applications were reviewed first by a county committee and then by a loan approval official before a

final decision was made to grant or deny the loan. 7 C.F.R. Sec. 1945.80, 1945.83 (1979). Although Mr. Carroll was deemed eligible for an emergency loan by the county committee, and despite repeated modifications of his application, he never received approval for an emergency loan from the loan approval official.

During the administrative appeal of the loan denial, legal counsel for the Secretary of Agriculture found procedural violations of the agency's administrative appeal regulations and reversed the denial of Mr. Carroll's application. Mr. Carroll submitted yet another loan application which was also denied, according to the government because the loan amount requested exceeded a newly implemented cap. Mr. Carroll asserts that a loan application filed by another individual (Minyard) for the same property was later accepted, despite the fact that the loan amount requested exceeded Mr. Carroll's request.

As the Ninth Circuit noted in their Memorandum opinion, this Court must determine whether Arizona law provides a cause of action against a private party analogous to the Carroll's claim against the United States. If Arizona law does not provide for such an action, this court must dismiss the Carrolls' case for failure to state a claim under the FTCA. Baker v. United States, 817 F.2d 560, 566 (9th Cir. 1987).

To establish their tort claim, the Carrolls must demonstrate that a duty recognized by Arizona law was owed to them by the FmHA. "'Duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff." Prosser, Handbook of The Law of Torts, Sec. 53 (1971). The essential question is "whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." Id. Imposing a duty reflects the policy considerations underlying the decision to protect a particular plaintiff,

including convenience of administration, capacity of the parties to bear the injury, and the moral blame attached to the wrongdoer, to name a few. Id. While there is no question the Carrolls have suffered significant financial and emotional indignities from this ordeal, there is a question as to whether their interest in receiving a loan from the FmHA entitled them to protection under the agency's negligent processing of their application. In general, a bank may be liable for failing to lend money in accordance with a contract it has entered. 10 Am. Jr. 2d Banks Sec. 683 (1983). In addition, bank officers must "act with the utmost good faith and cannot handle the funds or the property of the bank to their own advantage." 9 C.J.S. Banks and Banking Sec. 199 (1938).

To determine if a private remedy was implicit in the FmHA emergency loan statute, 7 U.S.C. Sec. 1961, several factors are relevant. Cort v. Ash, 422 U.S. 66 (1975).

First, is the plaintiff one of the class for whose especial benefit the statute was enacted? Id. at 78. Merely because the plaintiffs are benefited by the legislation does not mean that plaintiffs are necessarily members of the requisite "especial class". Spring Water Dairy, Inc. v. Federal Intermediate Credit Bank of St. Paul, 625 F. Supp. 713 (D. Minn. 1986). In Wilson v. Mason State Bank, 738 F.2d 343 (8th Cir. 1984) (Local farmer attempted to void an FmHA emergency loan note due a local bank), the Wilsons claimed that the Bank's violations of a federal regulation governing the agreement between the Bank and the FmHA caused them harm. The court found nothing in the regulations or the legislative history of the Emergency Agricultural Credit Adjustment Act to support implication of a private cause of action. The Eighth Circuit also determined that the Wilsons were not in "the class for whose especial benefit the statute was enacted." Wilson, 738 F.2d at 345. "[T]he

purpose of controlling the [FmHA emergency] loan process is not to protect the borrower, but rather to more adequately assure the protection of the Secretary as guarantor." Id.

Additional factors considered to determine whether a cause of action is implicit in a statute include any indication of legislative intent either to create or deny a remedy; whether implication of such a remedy is consistent with the underlying purpose of the legislative scheme; and finally, whether the cause of action is one traditionally relegated to state law, making it inappropriate to infer a cause of action based solely on federal law. Cort, at 78.

The Carrolls further attempt to support their claim by citing as authority for their cause of action sections 286 through 288(B) of the Restatement (Second) of Torts (1965). (See attached.) As plaintiffs contend, the Supreme Court of Arizona has consistently held that the Restatement rules are the law

of the state where no case has yet been decided, Bank of America v. J. & S. Auto Repairs, 143 Ariz. 416, 694 P.2d 246 (1985), Waddell v. White, 56 Ariz. 525, 109 P.2d 843 (1941). However, "Arizona courts do not follow the Restatement blindly." Cannon v. Dunn, 145 Ariz. 115, 700 P.2d 502, 503 (1985).

Application of Sec. 286 of the Restatement is questionable, however, because it requires that a special class of persons be protected and pursuant to Wilson, the Carrolls do not fall into a protected class. Defendant notes that Sec. 288(b) and (c) are applicable because the FmHA loan program is a government entitlement program.

The Carrolls also cite Sec. 874 Restatement (Second) of Torts (1977), Violation of Fiduciary Duty as a source for their cause of action. "Fiduciary" as used in this section is defined in Restatement (Second) of Trusts Sec. 2 (1957). Fiduciary relationships are defined there to include trustee and bene-

ficiary, guardian and ward, agent and principal, as well as attorney and client. Although two states have recognized that a banker and customer may be in a fiduciary relationship in limited circumstances, Arizona has not done so. Commercial Cotton Co., Inc. v. United California Bank, 1963 Cal. App. 3d 511, 209 Cal. Rptr. 551 (1985) (The relationship of bank to depositor is at least quasi-fiduciary.); Stone v. Davis, 66 Ohio St. 2nd 74, 419 N.E.2d 1094 (1984) (Bank acts as Customer's fiduciary as to mortgage insurance.). The Arizona standard for fiduciary or confidential relation in a fraud action is "a relation of parties in which one is bound to act for the benefit of the other . . . . mere confidence or implicit faith in another's honesty and integrity is [insufficient] to constitute a fiduciary or confidential relationship." Rhoads v. Harvey Publications, Inc., 145 Ariz. 142, 700 P.2d 840 (Ariz. App. 1984) (quoting In Re McDonnell's Estate, 65 Ariz. 248, 179 P.2d 238 (1947)).

Continuing to rely on their "protected class" theory, the Carrolls also seek relief under Restatement (Second) of Torts Sec. 874(A). This section is apparently not applicable for two reasons: (1) because it refers to a legislative provision protecting a particular class of persons and (2) in State v. Bolt, 142 Ariz. 260, 689 P.2d 519 (1984), the Supreme Court of Arizona noted specific expansions of tort theory in Arizona and went on to acknowledge "[o]ther states have recognized so-called prima facie torts. . . . Restatement Second Torts Sec. 870 and Sec. 874(A)." Bolt, at 527.

Finally, the Carrolls attempt to extend the tort cause of action for breach of the implied covenant of good faith and fair dealing to the FmHA's actions in denying their emergency loan applications. Arizona recognizes this particular tort claim in the limited contexts of insurance contracts and employment-at-will contracts. Rawlings v. Apodaca, 151 Ariz. 149, 729 P.2d 565

(1986); Wagonseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985). To sustain this particular tort action, however, there must have been either an actual or an implied contract. Rawlings, at 569. "The duty arises by virtue of a contractual relationship." Id. The duty has not been implied in all contracts, however, but is more often recognized where the contract creates a relationship in which the law implies special duties not imposed in other contracts and where the plaintiff seeks more than a commercial advantage or profit from the defendant. Id. at 574, 575. The Court acknowledges these relationships exist between clients/customers and innkeepers, common carriers, lawyers, doctors and insurers.

Arizona recognizes implied contracts, "those not created or evidenced by explicit agreement, but inferred by the law as a matter of reason and justice from the acts and conduct of the parties and circumstances of the transaction." Carroll v. Lee, 148 Ariz. 10, 712

P.2d 923 (1986); Alexander v. O'Neill, 77 Ariz. 91, 267 P.2d 730 (1954). Unfortunately, the Carrolls had no actual loan contract from the FmHA and mere approval by the County Committee, one step in the entire loan application approval process, is not tantamount to an implied contract for an emergency loan. Because the Arizona courts have limited this cause of action first to contract claims and secondly to insurance contracts and employment-at-will contracts, this Court can extend the action no further.

IT IS THEREFORE ORDERED that Defendant United States of America's Third Motion for Summary Judgment is granted and Plaintiffs' Cross Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Proceed And Answer an Oral Argument on Defense 3rd Motion For Summary Judgment is denied as moot.

DATED this 9th day of January, 1989.

/s/
Paul G. Rosenblatt,
Judge, U.S. Dist. Court.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Feb 6 1991

PAUL CARROLL and JACQUELINE CARROLL, husband and wife; DAVID CARROLL and BEVERLY CARROLL, husband and wife,	)	No. 89-15178
Plaintiffs-Appellants	)	D.C. No. CV-85-0135-PGR
v.	)	ORDER
UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued; Submission Deferred August 13, 1990
San Francisco, California

Before: CHAMBERS, KOZINSKI and NOONAN, Circuit Judges

The case is hereby resubmitted.

The judgment of the district court is affirmed on the basis of its memorandum and order of January 10, 1989.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL CARROLL and JACQUELINE CARROLL, husband and wife; DAVID CARROLL and BEVERLY CARROLL, husband and wife,	)	No. 89-15178
	)	D.C. No. CV-85-0135-PGR
Plaintiffs-Appellants,	)	
v.	)	ORDER
UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	

Before: CHAMBERS, KOZINSKI and NOONAN, Circuit Judges

The majority of the panel in the above case has voted to deny the petition for rehearing. Judge Noonan would grant the petition for rehearing. Judges Kozinski and Noonan have voted to reject the suggestion for rehearing en banc and Judge Chambers so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied,

and the suggestion for a rehearing en banc is rejected.

APPENDIX D

ARTICLE VI OF THE UNITED STATES CONSTITUTION

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX E

7 U.S.C. §1961. Emergency Agricultural Credit Adj. Act, 1978/P.L. 95-334 (8-4-1978) Page 713.

§ 1961. Eligibility for loans

(a) Persons eligible

The Secretary shall make and insure loans under this subchapter only to the extent and in such amounts as provided in advance in appropriation Acts to (1) established farmers, ranchers, or persons engaged in aquaculture, who are citizens of the United States, and (2) to farm cooperatives or private domestic corporations or partnerships in which a majority interest is held by members, stockholders, or partners who are citizens of the United States if the cooperative, corporation, or partnership is engaged primarily in farming, ranching, or aquaculture, where the Secretary finds that the applicants' farming, ranching, or aquaculture operations have been substantially affected by a natural disaster in the

United States or by a major disaster or emergency designated by the President under the Disaster Relief Act of 1974 [42 U.S.C. 5121 et seq.]: Provided. That they have experience and resources necessary to assure a reasonable prospect for successful operation with the assistance of such a loan and are not able to obtain sufficient credit elsewhere.

APPENDIX F